86-203

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1986

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

JACK MOLDOVAN and JACK DRAPER, as Trustees for the TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. May the trustees of a multiemployer health and welfare fund seek judicial enforcement of the terms of an alleged collective bargaining agreement against a participating employer, where it has already been determined in an arbitration between the employer and union that the agreement never existed and that arbitration award has been affirmed on appeal?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"),[1] respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that Court's judgment of May 13, 1986 in *Moldovan, et al. v. The Great Atlantic & Pacific Tea Company, Inc.*, No. 85-3276.

OPINIONS BELOW

The opinion of the Court of Appeals, from which this appeal is taken, is reported at 790 F.2d 894 (3d Cir. 1986), and appears as Appendix A hereto. The opinion of the District Court is unreported and appears as Appendix B hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered May 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[1]Pursuant to Rule 28.1. A&P has no parent company, subsidiaries (other than wholly-owned subsidiaries), or affiliates. Tengelmann-Warenhandelsgesellschaft, a partnership organized under the laws of West Germany and controlled by Mr. Erivan Haub, owns beneficially and of record approximately 52.4% of the outstanding shares of the Company's common stock as of May 1, 1986.

STATUTORY PROVISIONS INVOLVED

Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132(a)(3), provides in pertinent part as follows:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> * * *

Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185, provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, . . .

STATEMENT OF THE CASE

This case is one of first impression under ERISA and federal labor law. It is an action by the trustees of a multiemployer health and welfare fund[2] to recover allegedly delinquent contributions set forth in an underlying collective bargaining agreement, despite a final and binding adjudication in an arbitration between the employer and

[2]In its Opinion, the Third Circuit repeatedly and erroneously refers to the Plaintiffs as trustees of a pension fund. The Plaintiffs are, in fact, trustees of a health and welfare fund.

union that no such agreement ever existed. The delinquent contributions are allegedly owed to the Tri-State UFCW and Employee Benefit Fund ("Fund") on behalf of bargaining unit employees in A&P's Altoona, Pennsylvania Division ("Altoona Division"). Jack Moldovan and Jack Draper ("Trustees") brought this action on behalf of the Fund.

A&P operates a chain of retail grocery stores. Through its Altoona Division, it operated stores in Pennsylvania, New York, Maryland, Ohio and West Virginia. A&P had for some time experienced precarious business conditions in its Altoona Division, where the labor rate was the highest of A&P's divisions nationwide. On September 23, 1982, A&P closed all but six of the stores in its Altoona Division. The remaining six stores were transferred to A&P's Washington Division.

At the time of the Altoona Division closing, no collective bargaining agreement was in effect between A&P and the Union.[3] There were negotiations for the renewal of the 1977-1980 collective bargaining agreement beginning in June, 1980. Indeed, A&P and the Union thought that a successor collective bargaining agreement had been agreed to when they executed a handwritten Memorandum of Agreement on October 24, 1980 to reflect changes from the 1977-1980 contract.

After executing the Memorandum of Agreement, A&P and the Union began the process of drafting a new agreement. In May, 1981 the Union signed a proposed collective bargaining agreement and submitted it to A&P for

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[3]Altoona bargaining unit employees were represented by Local 590 of the United Food and Commercial Workers Union, AFL-CIO-CLC, herein referred to as the "Union."

signature. However, upon receipt of copies of the agreement executed by the Union, A&P discovered that it contained several material errors. After approaching the Union concerning these errors and being informed that the Union was unwilling to revise the draft, A&P refused to sign the draft agreement.

In the meantime, A&P received a number of scheduling grievances. Despite the absence of a signed collective bargaining agreement, A&P nevertheless agreed to arbitrate the Union's "grievances," but at the arbitration hearing interposed as a defense to the arbitrability of these grievances the claim that there was no collective bargaining agreement in effect between the parties. A&P and the Union agreed that the arbitration should be bifurcated and that the arbitrator should, in the first instance, decide only the issue of whether a collective bargaining agreement existed.

After four days of hearings and consideration of extensive testimony, written evidence, numerous exhibits and both pre-hearing and post-hearing briefs, the Arbitrator concluded that "[t]he 1977-1980 Agreement temporarily was extended during negotiations, but terminated on October 23, 1980." The Arbitrator further concluded that there never was a 1980-1983 collective bargaining agreement in effect between A&P and the Union. Specifically, the Arbitrator found that "the Parties *never* had attained mutual understanding [,] . . . *never* had reached a true agreement" and that "there *never* was a complete meeting of the minds on many essential issues" necessary to the formation of an overall accord. The Arbitrator expressly found that the "MOA [Memorandum of Agreement] was not intended to be a final, complete contract document and both parties

anticipated that their 'bargain' would have to be moulded into a more formal and complete instrument."

The Union subsequently filed an action to vacate the arbitration award. The District Court entered summary judgment for A&P, and the Third Circuit Court of Appeals affirmed. *United Food & Commercial Workers International Union, Local 590 v. The Great Atlantic & Pacific Tea Co., Inc.*, 734 F.2d 455 (3d Cir. 1984).

The Trustees in this action seek the recovery of health and welfare contributions alleged to be due by virtue of a provision in the non-existent 1980-1983 collective bargaining agreement. The applicable provision in the expired 1977-1980 collective bargaining agreement required A&P to make three months of contributions to the Fund on behalf of employees who were laid off during the term of said agreement. Despite the fact that Altoona employees were terminated upon the closing of the Altoona Division rather than laid off, and there was no collective bargaining agreement between A&P and the Union, the Fund nevertheless claimed entitlement to contributions for those employees.

The District Court entered summary judgment for A&P against the Trustees, finding that the Fund could not relitigate the existence of a collective bargaining agreement. The District Court also dismissed claims brought by the Trustees under Section 301 of the LMRA, Section 515 of ERISA, 29 U.S.C. §1145, and the Pennsylvania Wage Payment and Collection Law, 43 P.S. §260.1 *et. seq.*

On appeal, the Third Circuit (Gibbons, J.) affirmed the District Court's dismissal of the Trustees' causes of action brought under Section 515 of ERISA and the Pennsylvania Wage Payment and Collection Law. The Third

Circuit, however, further found that the Trustees were entitled to relitigate the existence of an alleged collective bargaining agreement between A&P and the Union. In effect, the Third Circuit sanctioned the anomalous procedure of permitting an entity not party to a contract to prove the existence of an agreement when the alleged contracting party has attempted but failed to do so.

REASONS FOR GRANTING THE WRIT

I. The Unprecedented Decision Of The Court Of Appeals Raises An Important National Labor Law Issue Of First Impression And Conflicts With This Court's Prior Decision In *Schneider Moving & Storage Co. v. Robbins*

A. Res Judicata And Collateral Estoppel Bar The Trustees From Relitigating The Existence Of A Collective Bargaining Agreement

Principles of res judicata and collateral estoppel are grounded upon the premise that matters already fully litigated and decided should not be relitigated between the same parties or their virtual representatives. The Third Circuit decision in this case for the first time permits the trustees of an employee benefit fund to prove the existence of a collective bargaining agreement where the union itself has already vigorously tried without success. Although recognizing the special status of fund trustees, this Court has never suggested that the rights of such trustees should be paramount to those of the employees' collective bargaining representative. A "special status" was not intended to be, and should not be, construed as an exalted status.

An arbitration award is a valid and final judgment. Therefore, res judicata and collateral estoppel preclude the

relitigation of disputes or issues previously resolved by an arbitrator. *See Adams v. Gould, Inc.*, 687 F.2d 27 (3d Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 246 (3d Cir. 1968); *Goldstein v. Doft*, 236 F.Supp. 730 (S.D. N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966). Accordingly, A&P and the Union are bound by the arbitration award and the question of the existence of a collective bargaining agreement after October 23, 1980 cannot be relitigated in any subsequent lawsuit between them.

The Trustees in this action are similarly bound by the arbitration award and the Third Circuit's affirmance of that award because the issue to be litigated in this action is identical to the issue already litigated by the Union and the Trustees' interests in proving the existence of a collective bargaining agreement are identical to those of the Union in arbitration.

Here, the issue advanced by the Trustees has already been decided. In order for the Trustees to recover allegedly past-due contributions, the District Court on remand must make a *de novo* factual finding that a valid collective bargaining agreement existed between A&P and the Union from September to December, 1982. However, "[a]ny contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the prior judgment's collateral estoppel effect." 1B *Moore's Federal Practice*, ¶0.443[2] at 761 (2d ed. 1984).

In addition to the identity of the issue raised by the Trustees, the Trustee and Union interests in establishing a collective bargaining agreement require application of res judicata and collateral estoppel principles. Relitigation of

identical claims and issues is barred where the interests of the same party are being represented. *Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U.S. 611 (1926); 1B *Moore's Federal Practice*, ¶0.411[1] at 395 (2d ed. 1984) ("[A] judgment adverse to X binds Y in another suit if Y appears in that suit to represent the interest of the same beneficiary represented by X in the first suit, whether the interest represented in the two suits is that of X, Y, or a third person."). *See Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Expert Electric, Inc. v. Levine*, 554 F.2d 1227 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977). It would be anomalous to hold that bargaining unit employees in their capacity as Fund participants could, through the Trustees, relitigate the existence of a collective bargaining agreement when the same employees in their capacity as members of the Union are bound by the arbitration award. *Adams v. Gould, supra*, 687 F.2d at 31 (arbitration award binds not only the union, but also all employees represented by the union).

Here, the Union and the Fund both represent the interests of the same beneficiaries, former Altoona Division employees. Accordingly, the arbitration award binding the employees as members of the Union is equally binding on them as beneficiaries of the Fund. The critical fact, as previously indicated by Professor Moore, is that the interests of the beneficiaries are the same in both cases.

Moreover, it is well recognized that a person may be bound by a judgment even though not a party to that judgment if one of the parties to the prior action is closely aligned either to his interests or to the interests represented by him. *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1572 (Fed. Cir. 1983) ("Federal courts have

repeatedly held a non-party may be bound by a judgment if one of the parties to the earlier suit is so closely aligned with the non-party's interests as to be its virtual representative."); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1975) ("Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.").

Both the Union's and the Trustees' need to establish the existence of a collective bargaining agreement after October 23, 1980 is clear. Thus, in this factual setting, the interests of the Union and the Trustees are identical, thereby precluding the Trustees from relitigating the existence of a collective bargaining agreement. Indeed, the Union had a more compelling interest in establishing a collective bargaining agreement because the very end product of collective bargaining is a labor agreement which encompasses terms and conditions of employment for the employees represented by the Union, including the right to receive benefits from the Fund.

The Third Circuit decision improperly adopts a "bright line" approach to the Trustees' right to relitigate issues previously decided between the employer and union in arbitration. The "bright line" theory holds that the *interests* of multiemployer trustees and employer members of a multiemployer employee benefit fund are *always* inherently in conflict. Therefore, the trustees should *always* be free to relitigate issues previously decided in arbitration between the employer and the union without consideration of the nature of the issue decided, the actual interest involved, or the terms of the applicable trust agreement.

The Third Circuit held that "[t]here is in every instance of a multi-employer benefit plan, and in every instance of even a single-employer benefit plan which includes retirees among its beneficiaries, a conflict between the interests of the fund and the interests of the members of a bargaining unit so fundamental that as a matter of due process the union representing employees in that unit cannot ever be deemed the representative of the fund." 790 F.2d at 899 (App. A, 11a-12a). As a result, the Third Circuit held that "[w]e follow the bright line approach of *Siemens*[4] in holding that the pension trustees[5] are not collaterally estopped from relitigating the issues decided in the arbitration between the union and the employer." 790 F.2d at 900. The Third Circuit "bright line" approach is in fundamental conflict with this Court's holding in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984).

In *Robbins*, this Court was careful to articulate the issue presented as "whether the trustees of two multiemployer trust funds may seek judicial enforcement *of the trust terms* against a participating employer without first submitting to arbitration an underlying dispute over the meaning of a term in the employer's collective-bargaining agreement." 466 U.S. at 365 (emphasis added). In resolving *Robbins*, this Court expressly rejected a "bright line" approach and instead examined the specific facts and circumstances surrounding both the trust agreement and collective bargaining agreement at issue.

Justice Powell wrote for a unanimous Court that "the question is whether the parties to the agreements at issue here intended to condition the trustees' contractual right to

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[4]*Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451 (3d Cir. 1983).

[5]*See* Footnote No. 1, *supra*.

seek judicial enforcement of the trust agreements on exhaustion of the arbitration procedures set forth in the collective-bargaining agreements." 466 U.S. at 371. In answering the above question in the negative, this Court repeatedly emphasized the critical role played by the intent of the parties.

This Court's opinion in *Robbins* did not articulate a "bright line" approach:

> [T]he agreements at issue here evidence no intent on the part of the parties to require arbitration of disputes between the trustees and the employers. Neither the terms of the trust agreements nor those of the collective-bargaining agreements contain any such requirement, and the circumstances surrounding the execution of each suggest that none should be inferred.

466 U.S. at 372-373.

> Nowhere in the trust agreements is the exercise of that authority [initiation of legal proceedings to collect contributions] expressly conditioned on the exhaustion of any contractual remedies that might be found in the collective-bargaining agreements of individual employers.

466 U.S. at 373.

> We hold that neither the trust agreements nor the collective-bargaining agreements at issue here evidence any intent to condition the contractual right of the trustees to seek judicial enforcement of the trust provisions on exhaustion of the arbitration procedures contained in petitioners' collective-bargaining agreements.

466 U.S. at 376.

The Third Circuit's adoption of a "bright line" rule directly conflicts with the fact-sensitive approach established by this Court in *Robbins*.[6]

Adoption of the "bright line" approach by the Third Circuit will yield absurd results in many cases. In this case, the "bright line" approach improperly subordinates the policy of finality for arbitration awards and traditional notions of collective bargaining to an inflexible rule bearing no rationality to the facts of individual cases or the practice and procedure of collective bargaining.

In affirming the right of the Trustees to relitigate the existence of a collective bargaining agreement after October 23, 1980, the Third Circuit has, in effect, permitted the prior arbitration award to be severely undermined. This is directly contrary to the extremely narrow standard of review which should be applied in actions to vacate an arbitration award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *W.R. Grace & Co. v. Local 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983); *Delaney v. Union Carbide Corp.*, 749 F.2d 17 (8th Cir. 1984) (Court applied standard for vacating arbitration awards in an action under ERISA by an employee seeking disability pension benefits after his union was unsuccessful in obtaining those benefits in arbitration).

The decisions of this Court, therefore, demonstrate an extreme reluctance to override an arbitrator's award in any manner. The Trustees offer no compelling reason for

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[6]It is also significant to note that Section 502(a)(3) of ERISA authorizes a direct civil action "to *enforce* . . . the terms of the plan." (Emphasis added). Nowhere does ERISA give the Trustees the ability to establish an obligation which does not exist between the employer and union.

departing from that policy.[7] The arbitration award should not now be disturbed in view of these policies favoring the sanctity of arbitration decisions.

B. The Court Of Appeals' Decision Improperly Assigns The Trustees A Role In The Collective Bargaining Process

The Third Circuit's decision also sanctions the Trustees' involvement in the process of attempting to create a collective bargaining agreement. Such an approach is unprecedented in federal labor law and subversive of the collective bargaining process, to this point thought to be the exclusive domain of the negotiating parties.

The National Labor Relations Act ("the Act"), 29 U.S.C. §151 *et seq.*, defines the collective bargaining process solely with reference to the employer and union. The term "collective bargaining" in the Act is defined by §8(d):

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but

[7]The Third Circuit decision in this case has further given judicial imprimatur to a scenario which permits the Trustees "two bites at the apple." The Trustees consciously did not prospectively disavow or otherwise interfere with the arbitration proceedings in the hope that the Union would secure a favorable decision. If the Union secured a favorable decision, the Trustees would have claimed entitlement to contributions under the collective bargaining agreement in effect pursuant to the arbitration award. At the same time, the Trustees filed the instant action in the event that the Union did not prevail, which subsequently occurred. A&P, on the other hand, must succeed twice to prevail under the Third Circuit's analysis.

> such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

29 U.S.C. §158(d).

"Under this definition, the collective-bargaining representatives of an employer and a union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to such economic weapons as strikes and lockouts, without any compulsion to reach agreement." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981).

Implicit in the ability of the employer and the union to negotiate is the ability to resolve contract formation disputes without outside interference. The parties to the collective bargaining process can, as indicated in *Amax*, resort to strikes or lockouts. In the alternative, the parties can forego such economic sanctions and agree that an arbitrator will decide whether a contract exists. The Fund plays no role at this stage. Only after a collective bargaining agreement comes into being may the Fund seek to collect contributions based on an interpretation of the language contained therein. *Viggiano v. Shenango China Div. of Anchor Hocking Corp.*, 750 F.2d 276, 279 (3d Cir. 1984) ("ERISA's concern is with the elements of a plan and its administration after it has been established rather than to mandate the creation of a program.").

The logical implications of the Third Circuit decision are indeed far reaching. In a situation where the employer and union fail to consummate a collective bargaining agreement solely because of wage differences, may the trustees seek to enforce provisions for pension and/or health and welfare contributions which had already been

agreed upon? May the trustees insist on participating in collective bargaining negotiations because they assert that their interest will not be adequately protected by the union? May the trustees seek to prove the existence of a collective bargaining agreement which the employer and union *agree* never existed?

Despite the Third Circuit's position that "[t]he trustees are not, and lawfully cannot be, participants in the collective bargaining process," *Moldovan*, 790 F.2d at 897 (App. A, 8a), their decision insinuates the trustees in the collective bargaining process in a manner never before envisioned.

The employer and the union should be permitted to strike whatever deal they desire without becoming answerable to the trustees. If pension and health and welfare contributions are reduced in negotiations in exchange for increased wages, so be it. The only role of the Trustees is to enforce the terms of a collective bargaining agreement already in existence which provides for contributions. The Trustees should not be entitled to the opportunity to prove an agreement between two other parties who already are bound by a finding that there is no agreement.

C. The Trustees Should Be Bound By The Arbitration Decision Between A&P And The Union Because Of The Trust Agreement's Terms

If the fact sensitive approach of *Robbins* had been applied by the Third Circuit, as it should have been, the Trustees would not be permitted to relitigate the existence of a collective bargaining agreement. The "bright line" approach applied by the Third Circuit prevented a detailed

review of the controlling document governing the relationship between the Fund and A&P, i.e. the Trust Agreement. The Trust Agreement terms show that the Trustees have agreed to depend upon A&P and the Union to set the terms of a collective bargaining agreement, if any.

Section 2.8 of the Trust Agreement provides in pertinent part as follows:

> The term "Collective Bargaining Agreement" means any applicable collective bargaining agreement *now existing between an Employer and Union* which provides for contributions to this Trust Fund, . . .

(Emphasis added).

If the Fund relitigates and proves the existence of a collective bargaining agreement, it will only inure to the benefit of the Fund. A&P and the Union are bound by a full and final adjudication that no collective bargaining agreement exists between them. Thus, the Fund is powerless to prove a now existing agreement *between an employer and union.*[8] The Third Circuit decision therefore permits the Trustees to exceed the power given to them under the Trust Agreement.

Further, Section 4.6 of the Trust Agreement provides as follows:

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[8]Similarly, Section 2.3 of the Trust Agreement defines "Employee" as follows:

> . . . all of the employees of the Employer for whom contributions are required *as set forth in the collective bargaining agreements.*

(Emphasis added).

In point of fact, either there was a collective bargaining agreement or there was no such agreement. The convoluted notion that there might be a collective bargaining agreement for some purposes but not for others is clearly not intended by the Trust Agreement, and is at odds with generally-accepted principles of federal labor law.

> The Trustees shall have the power to construe the provisions of this Agreement and Declaration of Trust, and any construction adopted by them in good faith shall be binding upon the Union, the Employers and the employees provided, however, that such construction shall not be contrary to any provision of the collective bargaining agreement.

It is paradoxical indeed that the Trustees are prohibited from construing the Trust Agreement to be different from any provision negotiated by A&P and the Union in a collective bargaining agreement, but yet are permitted by the Third Circuit to prove the existence of the entire collective bargaining agreement contrary to a final adjudication binding A&P and the Union. Proof of a collective bargaining agreement within the meaning and intention of the Trust Agreement is a prerequisite to recovery of contributions because Section 5.3 of the Trust Agreement states that "liability of each Employer shall be limited solely to the payment of the amount designated in the applicable collective bargaining agreement." The Trust Agreement authorization to collect "the amount designated in the applicable collective bargaining agreement" refers to a real labor agreement between A&P and the Union, not a quasi agreement proven by the Fund to which A&P and the Union are not bound by virtue of a full and final adjudication between themselves.[9]

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[9]If any further indication of the intent behind the Trust Agreement were necessary, Section 8.5 provides that " . . . in the event any collective bargaining agreement has been terminated prior to the *signing* of a new collective bargaining agreement, the Trust shall likewise continue on so long as the Union involved and the Employer are negotiating for a new collective bargaining agreement, or a renewal or extension of a collective bargaining agreement . . . ." (Emphasis added). It is undisputed that the parties engaged in no negotiations for a new agreement

(Continued on next page)

It is therefore clear that the Trust Agreement itself obligates the Trustees to rely upon A&P and the Union to negotiate a collective bargaining agreement. Application of the *Robbins* fact sensitive approach, rather than the Third Circuit's "bright line" approach, establishes that the Trustees have agreed with A&P in the Trust Agreement to be governed by a collective bargaining agreement negotiated by A&P and the Union or, if negotiations do not result in a labor agreement, to be bound by the absence of a collective bargaining agreement as well.

(Continued)
after the execution of the Memorandum of Agreement on October 24, 1980. It is further undisputed that A&P and the Union have *never* signed a collective bargaining agreement to succeed the expired 1977-1980 labor contract. Under these circumstances, Section 8.5 of the Trust Agreement clearly indicates no obligation by A&P to make any contributions.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3276

JACK MOLDOVAN and JACK DRAPER,
as Trustees for the Tri-State UFCW
and EMPLOYERS BENEFIT FUND.

v.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.
Jack Moldovan and Jack Draper,
Appellants

(D.C. Civil No. 82-2717)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 2, 1985

Before: ADAMS, *Acting Chief Judge*, and
GIBBONS and STAPLETON, *Circuit Judges*

(Opinion Filed: MAY 13, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Jack Moldovan and Jack Draper, the trustees of a multi-employer welfare benefit fund (trustees), appeal from a final judgment in favor of the Great Atlantic & Pacific Tea Company, Inc. (A&P). The trustees sought payment to the fund allegedly due under a collective bargaining agreement. Alternatively they sought recovery under Pennsylvania law or under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) (1982). The district court held that the trustees' claim under the collective bargaining agreement was barred by collateral estoppel, that Pennsylvania law was preempted by federal law, and that only the National Labor Relations Board could enforce section 8(a)(5). We hold that the court erred in holding that the trustees are collaterally estopped from enforcing their claim under the collective bargaining agreement. Thus we reverse.

I.

Jack Moldovan and Jack Draper, are, respectively, the employer and employee trustees of a multi-employer welfare benefit fund created, as authorized by section 302(c) of the Labor Management Relations Act (LMRA), 29 U.S.C. §186(c) (1982), by two labor organizations and five employers. The labor organizations are Locals 590 and 424 of the United Food and Commercial Workers Union, AFL-CIO. The employers are the defendant, A&P, and four other chain store operators. The fund's purpose is to provide group benefits for covered employees in the form of life, accident, and health benefits. The level of benefit is within the discretion of the trustees, with the intention that they "shall provide the maximum amount of benefits

which the Fund can, from time to time, furnish consistent with good business practice, after taking into consideration the reasonable reserves to be established and the payment of administration expenses," Joint Appendix at 725 (Trust Fund Agreement and Declaration of Trust, Art I, §1.2 ¶ 2). Eligible fund beneficiaries include current employees of the five employers as well as retirees. While the trustees determine benefits, contributions are determined by collective bargaining. Only one of the labor organizations participating in the fund, Local 590, has a collective bargaining relationship with A&P.

Local 590 and A&P grieved and arbitrated the question of whether a valid collective bargaining agreement exsited after the nominal expiration date of their 1977-1980 collective bargaining agreement. The arbitrator ruled that no collective bargaining agreement existed. Local 590 then filed suit in the United States District Court for the Western District of Pennsylvania seeking to modify the arbitrator's decision. The district court entered summary judgment against Local 590 and this court affirmed. *See United Food & Commercial Workers International Union, Local 590 v. The Great Atlantic & Pacific Tea Co.*, 734 F.2d 455 (3d Cir. 1984).

In the meantime, the trustees had filed suit in district court against A&P for A&P's failure to make contributions to the fund in accordance with the alleged collective bargaining agreement between Local 590 and A&P. The trustees' action was stayed pending disposition of the earlier arbitration. Once the arbitration was resolved, however, the district court held that the trustees were collaterally estopped from litigating the question whether A&P owed contributions to the fund because they were bound by the

arbitrator's decision that no collective bargaining agreement existed. The trustees contend that the district court's holding is a misapplication of the law respecting the preclusive effect of arbitration awards against third parties.

At the outset we must distinguish some issues that are not presented. If A&P lost an arbitration on an issue and a court confirmed the award, A&P would not be free to relitigate the issue when sued by a third party who did not participate in the arbitration. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 333-37 (1979); *Wilkes-Barre Publishing Co. v. Newspaper Guild, Local 120,* 647 F.2d 372, 383 (3d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). Conversely, Local 590, which lost the arbitration and the case in which it sought modification, would not be free, in litigation with a third party, to relitigate the issue on which it lost. Local 590 is not, however, a party to this lawsuit.

Moreover, this case is not a suit by employees in the A&P bargaining unit for wages or benefits due under a collective bargaining agreement. When an employee's claim "is based upon breach of the collective bargaining agreement, [the employee] is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." *Vaca v. Sipes,* 386 U.S. 171, 184 (1967). That result follows, not because of principles of the law of judgment preclusion, but because in the field of labor relations the courts ordinarily defer to collectively-bargained-for, dispute-resolution procedures. *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 736 (1981).

Even in cases where employees in a bargaining unit sue to enforce claims arguably based upon a collective bargaining agreement, however, the federal labor law policy favoring bargained-for, dispute-resolution mechanisms yields to competing policies in two situations: First, a

member of the bargaining unit may bring a separate suit against the employer and the union if he charges a breach of the duty of fair representation in processing a grievance or arbitration, *see DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983); *Vaca v. Sipes*, 386 U.S. at 176-86; *Cady v. Twin Rivers Towing Co.*, 486 F.2d 1335, 1337 (3d Cir. 1973); and, second, a member of the bargaining unit may bring a separate suit if his claim, although perhaps comprehended by the collective bargaining agreement, is also based upon federal statutory rights separate from that agreement, *see Barrentine*, 450 U.S. at 737; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

These statutory rights cases define the outer reach of the federal labor law policy of binding members of a bargaining unit to bargained-for, dispute-resolution mechanisms. This court has been careful to preserve the line between instances when members of a bargaining unit are bound by the bargained-for resolution of a dispute and when they are not. In *Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985), we held that even members of a bargaining unit could sue their employer for violations of the anti-discrimination clause, 29 U.S.C. §1140 (1982), and the fiduciary duty clause, 29 U.S.C. §1104 (1982) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001-1461 (1982). *See also Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 939 (3d Cir. 1985); *Viggiano v. Shenango China Division of Anchor Hocking Corp.*, 750 F.2d 276, 280-81 (3d Cir. 1984).

If the plaintiffs were members of the A&P bargaining unit and the dispute involved the interpretation of a collective bargaining agreement containing an arbitration clause, we would agree that such plaintiffs would be bound by the

arbitration award. That would follow not as a matter of collateral estoppel, but as a matter of the substantive federal law of labor relations. Where, as here, the dispute is not over the terms of a collective bargaining agreement, however, but is over its existence, even members of the bargaining unit are entitled to a *judicial* resolution of the question whether such a contract was still in effect. *See e.g., Gariup v. Birchler Ceiling and Interior Co.*, 777 F.2d 370, 373 n.8 (7th Cir. 1985); *International Brotherhood of Electrical Workers, Local 1228 v. Freedom WLNE-TV, Inc.*, 760 F.2d 8, 10 (1st Cir. 1985); *Rochdale Village, Inc. v. Public Service Employees Union*, 605 F.2d 1290, 1294 (2d Cir. 1979); *International Union v. International Telephone and Telegraph Corp.*, 508 F.2d 1309, 1313 (8th Cir. 1975); *International Ladies' Garment Workers' Union v. Ashland Industries*, 488 F.2d 641, 644 (5th Cir.), *cert. denied*, 419 U.S. 840 (1974).

In this case the matter of dispute between Local 590 and A&P was the existence of a collective bargaining agreement. While Local 590 filed a grievance claiming the contract continued, A&P contended otherwise. The parties agreed to submit to arbitration the question whether the agreement was still in effect; an issue that would ordinarily be resolved by a court. It is far from clear that the federal law of labor relations even requires the conclusion that Local 590's decision *to submit* that question to arbitration binds the members of the bargaining unit that it represents. The arguments favoring binding members of the bargaining unit in that respect are considerably narrower than those favoring binding them to arbitral contract interpretations. In a broad sense, a decision by a union to submit to arbitration the question of the continued existence of a contract is an exercise of its collective bargaining

authority. In a narrower sense, arbitration is not bargaining. Nevertheless we assume, *arguendo,* that an arbitrator's decision on an issue ordinarily subject to judicial resolution does, as a matter of substantive federal labor law, bind members of the bargaining unit.

Moldovan and Draper, however, are not members of the A&P bargaining unit. They are trustees of a fund that has as its beneficiaries employees in five bargaining units, not all of whom are even represented by Local 590, and retirees who are not members of *any* bargaining unit. Benefits paid from the fund are determined by the trustees independent of the collective bargaining process. The fund trustees, who by virtue of section 302(c) of the LMRA must equally represent employers and employees, have fiduciary obligations on behalf of all the beneficiaries. The level of contribution for each participating employer, however, is determined by collective bargaining between the employer and the representative of the bargaining unit. Therefore, the level of contribution may differ for each of the five employer members. In addition, bargaining between the employer and the union representative over the level of contributions or the obligation of the employer even to make contributions may affect the wages a[illegible] employment opportunities of the members of that unit. This in turn may affect not only the funds available to the trustees to pay benefits, but the bargaining posture of the collective bargaining representatives in the other four units, where job preservation may be less of an issue than preservation of the solvency of the fund. There is, in short, an inherent conflict between the interests of members of Local 590's A&P bargaining unit and the interests of other fund beneficiaries. *See U.M.W. Health & Retirement*

Funds v. Robinson, 455 U.S. 562 (1982); *NLRB v. Amax Coal Co.,* 453 U.S. 322, 336-38 (1981).

None of the policies that have been identified as favoring arbitral resolutions in the collective bargaining context apply to this case. The underlying dispute is not one as to which labor arbitrators are deemed expert; indeed the existence of the contract is ordinarily a matter for the courts. The trustees are not, and lawfully cannot be, participants in the collective bargaining process. The potential for conflict of interest that is the basis for the duty of fair representation exception is, in the case of the fund and the bargaining unit, patent. ERISA confers on fund beneficiaries statutory rights entirely apart from those that are collectively-bargained-for.

The Supreme Court and this court have consistently held that bargaining representatives do not represent trustees of benefit plans. For example, in *Central States v. Central Transport, Inc.,* 105 S. Ct. 2833, 2843 (1985), the Court held that a trustee need not rely on the union to monitor an employer's compliance with the plan. Similarly, in *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 370-76 (1984), the Supreme Court held that trustees of a multi-employer fund may seek judicial enforcement of an employer's obligation, contained in a collective bargaining agreement, to contribute to a fund without resorting to arbitration of the underlying dispute over the meaning of that agreement. In *Robbins,* Justice Powell explained.

> These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any dimunition of the fund caused by the arbitration requirements of a particular employer's collective-bargaining agreement would have an

> adverse effect on the other participants. The enforcement mechanisms established in the trust agreements protect the collective interests of the parties from the delinquency of individual employers by allowing the trustees to seek prompt judicial enforcement of the contribution requirements.

466 U.S. at 373 (footnotes omitted).

The conflict of interest that Justice Powell identified in *Robbins* may also be present in cases where the employer and the union arbitrate before the trustees of a fund act. In *Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451, 457 (3d Cir. 1983), this court recognized the same potential for conflict, and rejected the contention that an arbitration clause should limit fund trustees' access to the courts. Furthermore this court in *Siemens* expressly rejected the position that each case should turn on an individual determination as to the way in which the arbitration may be handled. Judge Sloviter wrote,

> Chief Judge Seitz, in his concurring opinion, suggests that the Trustees should be free to initiate their own action only where a conflict of interest makes it unlikely that the union will arbitrate the Trustees' claim in good faith. We share the Chief Judge's reluctance to widen federal trial court jurisdiction at the expense of the valuable processes of arbitration. We believe it is preferable to follow the "bright line" approach established here for a number of reasons. First, the other approach would create an ancillary issue of the union's ability to arbitrate in good faith in every suit brought by the Trustees, making the union a necessary, if not indispensable, party to every Trustees' suit. The preliminary inquiry into the existence of actual or potential conflict between the trustees and

> the union would generate more trial court activity than it would abate and would, in many instances, be more extended and complex than resolution of the merits of the employer's asserted obligation to the pension fund. Second, the issue of good faith would be, by its very nature, divisive and would unnecessarily pit the Trustees and the union as opponents. Third, proof of the ability to arbitrate in good faith may often be speculative and difficult, leaving the trust beneficiaries inadequately protected against those conflicts of interest that may be subtle, or as yet unrevealed. For these reasons, we have opted for a generally applicable rule under which the litigation would be limited to the relevant issue of the company's obligation to make the payment.

Id.[1]

The district court concluded that issue preclusion barred the trustees from relitigating the issue whether a collective bargaining agreement existed, stating that the trustees were "virtually represented" in the prior litigation by Local 590. We disagree, however, that the law of preclusion requires that result. A more fundamental issue is whether such a law would be consistent with due process. Although mutuality of estoppel by judgment is no longer considered to be a due process requirement, the development of nonmutual collateral estoppel made no change in the requirement that a party against whom collateral estoppel has been asserted have some fair relationship with the prior litigation relied upon. As the Supreme Court has explained.

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[1]Judge Stapleton does not share the views expressed herein with respect to the significance of the *Siemens* decision in the context of this case.

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issues which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1970) (citations omitted). *See also Parklane Hosiery Co.*, 439 U.S. at 332-33; *United States v. Webber*, 396 F.2d 381, 386 (3d Cir. 1968).

Whether the trustees had such a relationship with the prior litigation that its outcome can be held binding upon them depends upon what obligation Local 590 had to safeguard their interests. A nonparty may be collaterally estopped if the litigating party acted in a fiduciary capacity for a nonparty. *See Sea Land Services v. Gaudet*, 414 U.S. 573, 593 (1974). There are, however, due process limits to the recognition of a representative party status binding nonparties. As Chief Justice Stone wrote, "a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford the protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). It is the identity of *interests* that determines the due process question, not, as the district court apparently believed, the identity of *issues*.

There is in every instance of a multi-employer benefit plan, and in every instance of even a single-employer benefit plan which includes retirees among its beneficiaries, a conflict between the interests of the fund and the interests of the members of a bargaining unit so fundamental that as

a matter of due process the union representing employees in that unit cannot ever be deemed the representative of the fund. Courts which have addressed the question have recognized that fund trustees are not collaterally estopped from relitigating issues that a labor organization has litigated and lost. *See Board of Trustees v. Universal Enterprises*, 751 F.2d 1177 (11th Cir. 1985); *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160 (2d Cir. 1984). *Hansberry v. Lee* requires as much.

But even if *Hansberry v. Lee* were not controlling and we dealt only with the common law of judgment preclusion, the district court's approach was fundamentally unsound. The court focused on the interests of the parties in resolving a particular issue rather than on their relationship. The elimination of the requirement of mutuality of estoppel by judgment is justified principally, if not exclusively, by the interest of the judicial system in avoiding the burden inherent in the relitigation of issues about which a losing party was afforded fair notice and an opportunity to be heard. It makes little sense to apply a judge-made rule of nonmutual estoppel by judgment in situations in which litigation over the application of the rule may be as complex as the litigation which may be avoided by such application. By concentrating on whether the issue is the same in both cases and on the interests of the original party in litigating that issue, rather than on whether there is such an identity of interests between the first and second party that the second should ever be deemed in privity with the first, the district court applied a rule that would require case-by-case adjudication.

In *Siemens*, this court recognized that the case-by-case approach was unsound because it "would generate more trial court activity than it would abate and, in many

instances, would be more extended and complex than resolution of the employer's asserted obligation to the pension fund." 721 F.2d at 457. We follow the bright line approach of *Siemens* in holding that the pension trustees are not collaterally estopped from relitigating the issues decided in the arbitration between the union and the employer.

A&P contends that the collective bargaining agreement has expired. There is, however, a material issue of fact as to whether the contract was extended beyond its nominal termination date. That being so, we must reverse.

II.

Since we are remanding for further proceedings it is appropriate to address the other respects in which the trustees claim that the district court erred.

A.

Preemption of State Law

The trustees' state law claim is that A&P's unilateral termination of pension payments to laid-off workers, without bargaining to impasse, is unlawful under the Pennsylvania Wage Payment and Collection Act. *See* 43 Pa. Cons. Stat. Ann. §§260.1-260.45 (Purdon 1964 & Supp. 1985). The district court held that the allegations "contained in Court II are, in fact, allegations of an unfair labor practice within the purview of Section 8(a)(5)," and that federal labor law preempted the state law claim. Joint Appendix at 823.

Suits which allege unfair labor practices indisputably belong to the exclusvie jurisdiction of the NLRB, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). The Supreme Court has stated that where a

claim even arguably lies within section 8, preemption is indicated:

> At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, *e.g., Garner v. Teamster Union,* 346 U.S. 485, especially at 489-491; *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468.

Id. at 244-45. the issue is therefore whether the district court properly found that the gravamen of Count II was a section 8(a)(5) NLRA unfair labor practice charge, and was therefore preempted. It is well established that, under NLRA §8(a)(5), the employer must continue the terms of a collective bargaining agreement until it has bargained to an impasse, and may not unilaterally change its terms until then. *See, e.g., American Distributing Co. v. NLRB,* 715 F.2d 446, 449 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 2170 (1984). Count II clearly alleges that A&P had unilaterally changed the terms of a collective bargaining agreement prior to bargaining to impasse. Such conduct is regulated by NLRA §8(a)(5). Therefore, the district court did not err in ruling that the state claim was preempted.

B.

The Section 8(a)(5) Claim

While the trustees contend that the collective bargaining agreement was extended, their fallback position is that section 8(a)(5) of the NLRA required A&P to maintain the status quo, that failure to do so is a violation of section 515 of the Employee Retirement Insurance Security Act (ERISA), 29 U.S.C. §1145 (1982), and that they may vindicate the violation under the enforcement provision in section 502 of ERISA. 29 U.S.C. §1132 (1982). The district court rejected this contention.

Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or *under the terms of a collectively bargained agreement shall,* to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. §1145 (emphasis supplied). The language of the section, therefore, does not support the trustees' position.

Nevertheless, the trustees argue that the phrase "obligated to make contributions" in section 515 includes not only those obligations arising "under the terms of the plan or under the terms of a collective bargaining agreement, "but also obligations statutorily imposed under NLRA section 8(a)(5) which prohibits an employer from unilaterally changing the existing terms or conditions of employment before a bargaining impasse has been reached. In support of that interpretation the trustees advocate that we incorporate into section 515's contractual obligation the "obligation to contribute" which is contained in section 1392,

Subtitle E of ERISA. Section 1392 defines the "obligation to contribute" stating.

> **§1392. Obligation to contribute**
>
> **(a) Definition**
>
> *For purposes of this part,* the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a *duty under applicable labor-management relations law,* . . . .

29 U.S.C. §1392 (emphasis supplied). Subtitle E was added to ERISA in 1980 by the Multiemployer Pension Plan Amendments Act of 1979 (MPPAA). Pub. L. No. 96-364, 94 Stat. 1208, which was enacted to "remedy certain defects" of ERISA dealing with multi-employer pension plans. H.R. Rep. No. 96-869 at 51, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2919.

The trustees suggest this definition should be applied to section 515 of ERISA notwithstanding the specific admonition that it apply only "[f]or purposes of this part [i.e. Part 1 of Subtitle E. Employer Withdrawals from Multiemployer Plans.]" 29 U.S.C. §1392. As support for this position, they rely on *Laborers Health & Welfare Trust Fund v. Hess,* 594 F.Supp. 273 (N.D. Cal. 1984). In *Hess,* the court ruled that an employer was liable under ERISA section 515 for continued pension fund contributions on the basis of the trustees' rationale. Although the *Hess* court recognized the language of section 1392(a) limiting its definition of "obligation to contribute" to the MPPAA, it stated in a footnote that applying different definitions to

that phrase in different sections of ERISA would create unnecessary discontinuity in the regulatory scheme. *Id.* at 279, n.7.

We find the reasoning of the Court in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F.Supp. 1441, 1444-46 (W.D. Mis. 1985), more persuasive. When faced with an identical situation, the *Botsford* court expressly rejected the *Hess* rationale. It reasoned that by explicit language, Congress had indeed intended a different result under the two sections: "Congress chose to include both types of obligations in determining withdrawal liability [section 1392], but chose to create a cause of action and provide special damages for recovery of delinquent contributions only if those contributions were due under an agreement entered into by the employer [section 515]." *Id.* at 1445.

The district court therefore did not err in finding that section 515 of ERISA does not provide a ground for the appellants' claim in the absence of a valid labor agreement.

C.

Other Contentions

The trustees' remaining contention is that A&P is for several reasons estopped from denying that the collective bargaining agreement continued in effect. That estoppel contention is related to the underlying contract claim discussed in Part I above, and should be considered by the trial court in connection with that claim.

III.

We hold that the district court properly dismissed the trustees' claims predicated upon the Pennsylvania Wage

Payment and Collection Act and on section 8(a)(5) of the NLRA, but that it erred in holding that their claim for enforcement of the collective bargaining agreement was barred by collateral estoppel. The judgment appealed from will therefore be reversed and the case remanded for further proceedings.

ADAMS, J., *concurring.*

Because the panel opinion discusses many issues not raised by this appeal, it is necessary, I believe, to restate the decisive question that is before us: Are the interests of the trustees of the pension fund sufficiently congruent with those of Local 590 to justify holding the trustees bound by the results of the arbitration in which the union alone participated? I join in the majority's result because I agree that the answer to this question is no. Given the divergence of interests between a union and the trustees of a pension fund, as recognized in *Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451, 457 (3d Cir. 1983), to treat the two parties as being in privity would contravene the common law of judgment preclusion as well as the due process clause.

Nonetheless, I do not join in the panel opinion because of the declarations it sets forth that seem to me wholly unnecessary to the decision of this case. For example, the discussion of the issues concededly *not* presented, *see* typescript at 5-9, goes beyond what is needed to clarify the question that is presented; it amounts to a series of answers to hypothetical questions concerning arbitration and federal labor law. This appeal does not require the Court to "define the outer reach of the federal labor law policy of binding members of a bargaining unit to bargained-for-dispute-resolution mechanisms," typescript

at 6, and I think it is inappropriate for the Court to reach out to do so.

The majority opinion also offers the sweeping conclusion that, "*None* of the policies that have been identified as favoring arbitral resolutions in the collective bargaining context apply to this case." Typescript at 10 (emphasis added). But the amenability to arbitration of the underlying dispute over the existence of the collective bargaining agreement is not controverted here. The underlying dispute already has been arbitrated by Local 590, and our sole task is to decide whether the results of that arbitration bind the trustees of the pension plan. I respectfully submit that to answer that question, we need not predict how the Court might adjudicate a number of other complex issues of labor law.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK MOLDOVAN and JACK DRAPER, as Trustees for the TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND,
Plaintiffs

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Defendant

Civil Action No. 82-2717

OPINION

MANSMANN, *District Judge*

This action is before the Court on Cross-Motions for Summary Judgment. For the reasons set forth below, the Plaintiff's Motion is denied and the Defendant's Motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

The Altoona Division of the Defendant, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), at one time operated 96 stores in Pennsylvania, New York, Maryland, Ohio and West Virginia. Many of the employees of these stores were covered by a collective bargaining agreement between the Defendant and Local 590 of the United Food and Commercial Workers International Union

("Local 590"). The collective bargaining agreement at issue in the instant litigation became effective on October 2, 1977 and was due to expire on September 27, 1980 ("1977-1980 agreement").

In June of 1980, the Defendant and Local 590 began negotiations for a new agreement. When the September 27, 1980 deadline passed, the collective bargaining agreement by its terms continued in force during the negotiations. On October 23, 1980, the negotiators for the Defendant and for Local 590 apparently reached an agreement. The following day a handwritten Memorandum of Agreement was drafted and executed. The Memorandum of Agreement was apparently intended to reflect modifications of the 1977-1980 agreement which would be incorporated into the new agreement at a later date.

The Defendant and Local 590 subsequently began drafting the new agreement. The resulting draft agreement was executed by Local 590 in May of 1981. When the new agreement was submitted to the Defendant, senior officials of the Defendant A&P refused to sign it, claiming that it did not accurately reflect the 1980 Memorandum of Agreement.

Despite its refusal to sign the new agreement, the Defendant nevertheless agreed to arbitrate Local 590's grievances, including a grievance concerning the reduction of certain full-time employees to part-time status and the scheduling of part-time employees. The parties selected Arbitrator Clair V. Duff to hear the dispute. The Defendant and Local 590 agreed that the arbitrator would decide initially whether or not a collective bargaining agreement existed before considering the merits of the grievances. On January 5, 1983, Arbitrator Duff rendered an opinion which concluded that no collective bargaining agreement

had existed between the two parties after October 23, 1980. *See* Answer to Amended Complaint, docket No. 19, exhibit A.

Local 590 filed suit in the United States District Court for the Western District of Pennsylvania seeking to modify the arbitrator's award. On June 29, 1983 the District Court entered summary judgment affirming the arbitrator. *United Food & Commercial Workers Int'l Union, Local 590 v. Great Atlantic & Pacific Tea Co.*, Civ. No. 83-212, Slip op. (W.D. Pa. June 29, 1983) (McCune, D. J.). Local 590 appealed to the United States Court of Appeals for the Third Circuit. The appeals court affirmed the district court. *United Food & Commercial Workers Int'l Union, Local 590, AFL-CIO-CIC v. Great Atlantic & Pacific Tea Co.*, 734 F.2d 455 (3d Cir. 1984).

The instant litigation arises out of the closing of 40 of the 46 stores in the Altoona Division of the Defendant A&P on September 23, 1982. The Plaintiffs are trustees for the Tri-State UFCW and Employers Benefit Fund ("Fund"). The Plaintiffs allege that the Defendant is obligated to contribute to the Fund for three months following the time when an employee is laid-off. The Plaintiffs assert that following the closing of the 40 Altoona Division stores the Defendant failed to meet its obligation to contribute to the fund for the permanently laid-off workers. The Plaintiffs allege federal question jurisdiction pursuant to Sections 502(a)(3), 502(e) and 502(f) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§1132(a)(3), (e)&(f) (1975), and Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C.A. §185 (1978), and diversity jurisdiction with respect to the state claims contained in Count II.

In Count I of the Amended Complaint, the Plaintiffs allege that the Defendant failed to contribute to the Fund as required by the terms of the collective bargaining agreement between the Defendant and Local 590 in violation of Sections 502 and 515 of ERISA and Section 301 of the LMRA. In Count II, the Plaintiffs assert that the Defendant violated the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 PA.CONS.STAT.ANN. §§260.1-260.45 (Purdon 1964 & 1984 Supp.), by impermissibly and unilaterally changing the terms and conditions of employment, and that the Defendant is estopped by its conduct to assert defenses to its obligation to contribute to the fund.

DISCUSSION

The parties' Cross-Motions for Summary Judgment are before the Court. The Defendant, in support of its Motion, contends that this Court has no federal question jurisdiction over the ERISA and the LMRA claims because there is no contract or obligation requiring the Defendant to contribute to the Fund. The Defendant also asserts that the allegations contained in Count II of the Amended Complaint, if true, constitute an unfair labor practice cognizable only under the National Labor Relations Act ("NLRA"). The Defendant argues that all other claims contained in Count II are preempted by the NLRA. The Plaintiffs assert that the Court has federal question jurisdiction, reject the Defendant's preemption argument, and ask for summary judgment on the merits.

Count I

The Court first addresses the question of federal question jurisdiction over the ERISA and the LMRA claims contained in Count I. The Defendant argues that Section

301 of the LMRA speaks only to contractual obligations. Section 301(a) provides, in relevant part:

> Suits for violation of contracts, between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.

LMRA, §301(a), 29 U.S.C.A. §185(a) (1978). The Defendant also contends that Section 515 of ERISA addresses only obligations to contribute under the terms of a collective bargaining agreement or a trust plan. Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

ERISA, §515, 29 U.S.C.A. §1145 (1984 Supp.).

The Plaintiff offers four theories under which they claim an obligation to contribute and federal question jurisdiction. These theories involve the collective bargaining agreement, the trust plan, statutory obligations, and estoppel by conduct. The Court will address each of these theories separately.

The Collective Bargaining Agreement.

The Defendant contends that the Plaintiffs are bound according to principles of *res judicata* and/or collateral estoppel by Arbitrator Duff's decision that there was no collective bargaining agreement between Local 590 and the

Defendant after October 23, 1980. The Plaintiffs argue that they are not barred by principles of *res judicata* or collateral estoppel from asserting the existence of a collective bargaining agreement. The Plaintiffs maintain that they were not parties to the arbitration, that they are not the privies of Local 590, and that Local 590 was not their virtual representative in the arbitration. Consequently, the Plaintiffs assert that they are not bound under either a theory of *res judicata* or of collateral estoppel.

There can be no doubt that the Plaintiffs and Local 590 are not the same parties. Clearly, the trustees do not act as agents for either the union or the employer. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 331-32 (1981); Trustees of Local 478 Trucking & Allied Indus. Pension Fund v. Siemens Corp., 721 F.2d 451, 455-57 (3d Cir. 1983) (hereinafter "Siemens Corp."). Indeed, it cannot be said that the contractual relationship between the Plaintiffs and Local 590 places them in privity for all purposes. *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 167 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1181 (1985). The Plaintiffs, as trustees of such a multi-employer pension fund, are obligated to protect the interests of the fund and its beneficiaries. *Siemens Corp.*, 721 F.2d at 456-57. While the trustees are appointed by either the union or the employer, their interests have been found to be antithetical to those of the appointing party. *Amax Coal Corp.*, 453 U.S. at 331-32; *Siemens Corp.*, 721 F.2d at 456.

The parties urge the Court to choose between the national policy favoring arbitration and the national policy favoring "the preservation of the independence and integrity of pension funds." *Siemens Corp.*, 721 F.2d at 455. It is not necessary for either policy to be compromised. The Court is not confronted with the question of requiring the

Trustees to submit to arbitration. Instead, the Court must decide whether a prior arbitration is binding in a very limited situation.

Both Local 590 and the trustees would like to establish the existence of the collective bargaining agreement after October 23, 1980 albeit for different reasons. Local 590 needed to establish that such an agreement was in force so that it could pursue its grievances and maintain the rights of its members. The trustees need to establish the agreement's existence in order to collect funds. Because the existence of a collective bargaining agreement goes to the heart of the union's interests and to the essence of the trust's functions, it cannot be said that in the very limited arbitration before Arbitrator Duff the interests Local 590 and of the Plaintiff-trustees did not coincide.

In such a situation as this, where the interests of the party pressing its claim have been fully and fairly represented in an adjudication by another whose interests are closely aligned, *res judicata* or collateral estoppel may bar relitigation of those same issues. The principles of the preclusion doctrines may be extended to those in privity with the parties to the initial action or to those whose interests were fully and fairly represented by the parties. *Society Hill Civic Assoc. v. Harris*, 632 F.2d 1045, 1050 n.4 (3d Cir. 1980). The opinion of the United States Court of Appeals for the Fifth Circuit in *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975), is instructive. The *Aerojet-General* Court held:

> Under federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

Id. at 719 (citations omitted).

The Court finds that the interests of the Plaintiffs, in establishing that a collective bargaining agreement was in effect after October 23, 1983, were fully and fairly represented by Local 590 in the arbitration before Arbitrator Duff. Although the two adjudications cannot be said to involve the same parties or privies, the interests of Local 590 and of the Plaintiff are closely aligned with respect to this particular issue. The Court finds that Local 590 acted as the virtual representative of the Plaintiffs in the prior arbitration.

The Plaintiffs argue that they are not bound by the agreement between Local 590 and the Defendant to arbitrate the existence of the collective bargaining agreement. The fact that the union and the employer agreed to submit the question to the arbitrator is not relevant to the application of the doctrines of *res judicata* and collateral estoppel. Parties may agree voluntarily to submit an issue to an arbitrator. *Kane Gas Light & Heating Co. v. International Brotherhood of Firemen & Oilers, Local 112*, 687 F.2d 673, 676, 683 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983). The arbitration in question was upheld by the United States District Court as well as by the United States Court of Appeals. Arbitrations may have preclusive effect in future litigation under the doctrines of *res judicata* and collateral estoppel. *See Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 246 (3d Cir. 1968).

Consequently, the Plaintiffs are collaterally estopped from relitigating the issue of the collective bargaining agreement's existence. The Plaintiffs are bound by Arbitrator Duff's ruling that no collective bargaining agreement was in effect between Local 590 and the instant Defendant after October 23, 1980.

The Trust Agreement.

The Plaintiffs argue that the Defendant had an obligation to contribute to the Fund by virtue of the continuation or extension of the obligation contained in the 1977-1980 agreement. The Court accepts, for purposes of this Motion, the Plaintiffs' assertion that the Defendant is an employer as defined in section 2.1 of the Trust Agreement and is, therefore, bound by "all of the obligations imposed by this Trust." Trust Agreement, §2.1, docket no. 69, at 4. Likewise, the Court agrees "that if an employer's obligation arises under an extension of a collective bargaining agreement, the Trustees have a power and duty to collect those contributions." Brief in Support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defendant's Motion for Summary Judgment, at 45-46 (hereinafter "Plaintiffs' Brief"). The Court accepts, for purposes of this Motion, the Plaintiffs' argument that the Defendant's characterization of section 5.3 of the Trust Agreement as a limit on the obligation of an employer to the specific term of a collective bargaining agreement is incorrect.

The essence of the Plaintiffs' argument lies in the interpretation of section 8.5 of the agreement. Section 8.5, which is entitled "Term of Trust", provides, in relevant part:

> This Trust shall continue so long as any collective bargaining agreement exists which provides for contributions to be made to the Trust Fund hereunder, and in the event any collective bargaining agreement has been terminated prior to the signing of a new collective bargaining agreement, the Trust shall likewise continue on so long as the Union involved and the Employer are negotiating for a new collective bargaining agreement . . .

> Notwithstanding any provisions herein concerning the duration and termination of this Trust, the Trust shall continue in existence for so long a period as may be necessary to conclude its affairs.

Trust Agreement, §8.5, docket no. 69, at 27. The Court finds that this provision applies only to the duration and termination of the trust as an entity. While statutory law may require the employer to maintain the status quo and continue contributions during the negotiation of a new collective bargaining agreement, nothing in the Section 8.5 of the Trust Agreement, quoted here, provides an independent obligation to continue contributions.

Consequently, the Court rejects the Plaintiffs' contention that there is ERISA and LMRA jurisdiction over this case based on an obligation to contribute contained in the Trust Agreement itself.

Statutory Obligations.

The Plaintiffs contend that Section 515 of ERISA, 29 U.S.C. §1145, "creates a federal statutory right to prompt and efficient collection of delinquent contributions, which should not be subject to final resolution in arbitration." Plaintiff's Brief, at 25. The Plaintiffs ask the Court to examine the legislative history and the opinion of the United States Court of Appeals for the Ninth Circuit in *Amaro v. The Continental Can Company*, 724 F.2d 747 (9th Cir. 1984). The Plaintiffs urge the Court to accord the same status to ERISA as the Supreme Court has to Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and to the Fair Labor Standards Act in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). The essential question is whether ERISA confers statutory rights on the Plaintiffs, including the right to file suit in

federal court, which cannot be impaired by a prior arbitration on the existence of the underlying agreement.

The legislative history of ERISA invoked by the Plaintiffs informs that ERISA was enacted to "simplify delinquency collections" so that they might be recovered "efficaciously, and without regard to issues which might arise under labor-management relations law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982) *and Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433, 440 n.4 (8th Cir. 1983), *aff'd*, 104 S.Ct. 1844 (1984). Those principles are not infringed by applying the principle of collateral estoppel, a principle which is not part of labor-management relations law. This is especially true where, as here, the issue to which estoppel is applied is the very existence of the collective bargaining agreement. Certainly, the legislative history can be read to indicate that ERISA actions for delinquent contributions should be efficaciously conducted. Where there is no underlying promise or contractual obligation, however, no ERISA claim should lie.

The *Amaro* case relied on by the Plaintiffs is likewise not on point. Although the *Amaro* Court held that the claimants had a statutory ERISA right to proceed despite prior arbitration, the ERISA claim invoked in *Amaro* was a Section 510 claim which alleged that the company had laid off employees in order to interfere with the attainment of their benefit rights. The Court found:

> This statutory claim is not for benefits under a collective bargaining agreement. . . . The ERISA action is to enforce statutory rights designed to protect the employees from actions which interfere with their attainment of eligibility for those benefits. We are persuaded that in enacting section 510, Congress created

> a statutory right independent of any collectively bargained right.

Amaro, 724 F.2d at 749 (citation omitted). The instant case is brought on a different basis. The Plaintiffs seek to enforce an obligation to contribute to the fund under Section 515 of ERISA.

The Court finds the reasoning of the United States Court of Appeals for the Eighth Circuit in *Delaney v. Union Carbide Corp.*, 749 F.2d 17 (8th Cir. 1984), to be more closely aligned to the issue in the instant case. In *Delaney*, the Plaintiff argued that the arbitration clause contained in the collective bargaining agreement was unenforceable and that he was entitled to pension benefits notwithstanding a prior arbitration. The *Delaney* Court was confronted with the same argument based on Title VII and the Fair Labor Standards Act as the Court is here. The *Delaney* Court noted that "[t]the key distinction between the present case and cases like *Barrentine* and *Alexander*, we think, is that here the rights that plaintiff seeks to enforce are wholly created by contract, the very contract that also contains the arbitration clause plaintiff seeks to avoid." *Delaney*, 749 F.2d at 19.

The rights asserted here are likewise contractual in nature. The Court refuses to imply statutory rights under Section 515 of ERISA where the Plaintiffs can demonstrate no independent contractual right.

Estoppel by Conduct

The Plaintiffs contend that because the Defendant continued to make contributions for up to three months on behalf of laid off employees before and after the closing of the Altoona Division, the Defendant is estopped to deny

the existence of an agreement to make the contributions to the Fund in the event of a layoff.

The Plaintiffs' argument is not persuasive. The Defendant is required by section 8(a)(5) of the NLRA, 29 U.S.C.A. §158(a) (1973) to maintain the status quo by continuing contributions until bargaining to an impasse with the union. given that statutory obligation, the Court cannot say that the Defendant should be estopped by its conduct to deny its non-NLRA obligation to contribute.

The cases on which the Plaintiffs rely do not support their argument. In *Central States Southeast & Southwest Areas Pension Fund v. Hitchings Trucking,* 472 F. Supp. 1243, 1246 (E.D. Mich. 1979), the court found that the employer has not effectively terminated the year to year continuation of the contract. While the Court noted that the actions of the employer in checking off union dues and contributing certain funds in compliance with the contract "would have the tendency to estop the employer from denying the existence of an agreement," *id.* at 1247, the estoppel issue was not squarely before the Court.

In *Producers Dairy Delivery Co. v. Western Conf. of Teamsters Pension Trust Fund,* 654 F.2d 625 (9th Cir. 1981), the Court was confronted with a situation in which the employer had continued to contribute funds even after bargaining to an impasse. The Court ruled that the employer could not get a refund for the contributions made after reaching an impasse in the negotiations. The employees had continued to work, said the Court, on the premise that those contributions had been made to the Fund on a non-refundable basis. Consequently, to allow the company to get the money back would be to allow the employees to be mislead.

Neither case cited by the Plaintiffs provides persuasive authority. The Court finds no other basis for a claim of estoppel by conduct where the conduct is statutorily mandated. Consequently, the Court rejects the Plaintiffs' position that their estoppel theory provides a basis for ERISA and/or LMRA jurisdiction in this case.

Count II

The Defendant argues that the ERISA, the LMRA and the state law claims contained in Count II are preempted by the NLRA. The Defendant contends that the gravaman of the Count II allegations is that the Defendant committed an unfair labor practice in violation of Section 8(a)(5) of the NLRA and that, as such, the claims belong to the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). The Defendant concludes that the Court has no jurisdiction over the state and federal claims contained in Count II.

The Plaintiffs deny that Count II alleges an unfair labor practice pursuant to Section 8(a)(5) of the NLRA. The Plaintiffs contend that Count II makes out a claim based on the Defendant's improper interpretation of the terms and conditions of employment and is not based on a unilateral change of those terms and conditions. The Plaintiffs argue: "The Fund is before this Court seeking damages from A&P as a result of the breach of a term and condition which A&P continued after the expiration of the 1977 Agreement, but which A&P did not properly interpret." Plaintiffs' Brief, at 56-57.

Suits which allege unfair labor practices belong to the exclusive jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959). Suits to enforce provisions of collective bargaining agreements

are, on the other hand, subject to the jurisdiction of the federal district courts. 29 U.S.c. §185(a); *Cement Masons Health & Welfare Trust Fund for Northern California v. Kirkwood-Bly, Inc.*, 520 F. Supp. 942, 944 (N.D. Cal. 1981) (hereinafter *"Cement Masons"*), *aff'd without opinion*, 692 F.2d 641 (9th Cir. 1982). Indeed, the NLRA does not pre-empt a district court's jurisdiction over a section 301 LMRA action for breach of contract which is also an unfair labor practice. *Smith v. Evening News Assoc.*, 371 U.S. 195, 201 (1962).

In the present case, the Defendant was obligated by the terms of the 1977-1980 collective bargaining agreement to make certain payments to the Fund. Upon expiration of that agreement, the Defendant continued to make payments to the Fund. Indeed, the Defendant is compelled by the NLRA to continue to contribute to such a pension fund as required by the expired agreement until it has bargained to an impasse. *See* NLRA, §8(a)(5), 29 U.S.C.A. §158(a)(5) (1973); *Capitol City Lumber Co. v. NLRB*, 721 F.2d 546, 548-49 (6th Cir. 1983) *(per curiam), cert. denied*, 104 S.Ct. 1291 (1984); *American Distributing Co., v. NLRB*, 715 F.2d 446, 449-50 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2170 (1984). In the instant case, as the Defendant expressly asserts, the Defendant and Local 590 had not bargained to an impasse and the statutory obligation to contribute remained. *See* Defendant's Reply Brief, at 42 n. 48.

The Plaintiffs argue that Count II involves a misinterpretation by the Defendant of the terms and conditions of employment which existed by virtue of section 8(a)(5) of the NLRA and which had been recognized by the Defendant. Thus, the Plaintiffs claim that they assert a Section

301 claim for breach of contract, not an unfair labor practice claim.

The Defendant relies primarily on the opinion of the district court in *Cement Masons*, 520 F. Supp. 942. *Cement Masons* involved a similar factual situation in which the Plaintiffs claimed that the contract itself survived the expiration date. *Id.* at 944. The *Cement Masons* Court held:

> As the court in *Hinson [v. NLRB*, 428 F.2d 133 (8th Cir. 1970)] indicated, these agreements do not "survive" in the sense that they continue as legally operative documents; rather, the *terms* "survive" in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations.

Id. at 945. The Court agrees with this reasoning. To the extent Section 8(a)(5) of the NLRA extends the duty of the employer to contribute, it does so only for purposes of the NLRA.

Thus, to the extent the Plaintiffs wish to make out either an ERISA or an LMRA cause of action, they are required to establish some independent obligation of Defendant. In light of this Court's ruling with respect to Count I theories, there is no basis upon which the Plaintiff can assert a violation of either ERISA or the LMRA. Consequently, the federal claims contained in Count II are preempted by the NLRA.

With respect to the state law claims contained in Count II, the same analysis applies. As the Court stated above, the Plaintiffs' claims are preempted by the NLRA to the extent that they rely on an obligation to contribute arising under section 8(a)(5) of the NLRA. The United

States Supreme Count noted in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.

The *Garmon* Court continued:

> When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245.

The State Law Claims contained in Count II are, in fact, allegations of an unfair labor practice within the purview of Section 8(a)(5). Although the Plaintiffs assert that a misinterpretation of an 8(a)(5) obligation does not constitute a breach of that section, the Court finds this to be merely a semantic, not a substantive difference. Indeed, the wording of the Amended Complaint itself belies the Plaintiffs' reasoning. In the Amended Complaint, the Plaintiffs alleged that the "Defendant unilaterally changed the terms and conditions of employment without notifying the employees of the change." Amended Complaint, docket no. 16, ¶24, at 7. The Court finds no basis for distinguishing the Count II state law claims from a Section 8(a)(5) unfair labor practice allegation.

Consequently, the Court grants the Defendant's Motion with respect to Count II.

For the reasons stated above, the Defendant's motion is granted and the Plaintiffs' Motion is denied.

An appropriate Order shall issue.

Dated: April 17, 1985

/s/ CAROL LOS MANSMANN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK MOLDOVAN and JACK DRAPER, as Trustees for the TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND,
Plaintiffs

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.
Defendant

Civil Action No. 82-2717

ORDER

And now, this 17th day of April, 1985, in conformity with the foregoing Opinion, it is hereby ORDERED that the Plaintiffs' Motion for Summary Judgment is DENIED and the Defendant's Motion for Summary Judgment is GRANTED.

It is further ORDERED that Judgment is ENTERED in favor of the Defendant and against the Plaintiff.

/s/ CAROL LOS MANSMANN
United States District Judge

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